UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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| THURSTON HORTON,<br>Plaintiff, | : | |
| v. | : | C.A. No. 01-111 T |
| STANLEY-BOSTITCH, INC.,<br>Defendant. | : | |

**REPORT AND RECOMMENDATION**

David L. Martin, United States Magistrate Judge

Before the court is the motion of Defendant Stanley-Bostitch, Inc. ("Defendant" or "Stanley"), for summary judgment pursuant to Fed. R. Civ. P. 56. Plaintiff Thurston Horton ("Plaintiff") has objected to the motion. This matter has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a). After listening to oral argument, reviewing the memoranda submitted, and performing independent research, I recommend that the motion be granted.

**Overview**

This is an employment discrimination action. Plaintiff, an African-American male, alleges racial discrimination by his former employer, Stanley, in violation of Title VII, 42 U.S.C. § 1981, the Rhode Island Fair Employment Practices Act, and the Rhode Island Civil Rights Act of 1990.

**Facts[1] and Travel**

[1] The facts are taken from the Complaint, Defendant's Statement of Material Facts Not in Dispute ("Stanley's SMF"), the various affidavits submitted, including the Affidavit of Plaintiff Thurston Horton in Support of His Objection to Summary Judgment ("Plaintiff's

~~Plaintiff is a~~ Rhode Island resident. Stanley, a

Aff."), and the exhibits attached to those documents.

Plaintiff filed his Disputed Material Facts ("Plaintiff's SDF") on March 15, 2002. However, Plaintiff's SDF fails to provide "a statement of disputed facts, embroidered with specific citations to the record ...." Ruiz Rivera v. Riley, 209 F.3d 24, 28 (1st Cir. 2000). Rather, Plaintiff states that he disputes "[t]hat Defendant has a policy that requires wire winders to obtain permission from supervisor before leaving their wheel to use the toilet or go to lunch." Plaintiff's SDF ¶ 1. While Stanley contends that it has a policy requiring wire winders to tell their supervisor if they leave their wheel, see Defendant's SMF ¶ 6, this dispute is not material to the controversy at hand, and the court need not resolve it. Plaintiff's SDF ¶ 2 addresses the ultimate issue of the case. See id. (disputing "[t]hat Plaintiff was terminated for alleged policy violations"); see also Connell v. Bank of Boston, 924 F.2d 1169, 1178 n.7 (1st Cir. 1991)("[T]he affidavit simply states Browne's opinion as to the ultimate issue, a determination which, as a lay witness, Browne is no more prepared to make than the trier of fact."). Furthermore, Plaintiff provides no citations to the record to support his assertion. See Plaintiff's SDF ¶ 2. Finally, Plaintiff's SDF ¶ 3 asserts "[t]hat pay roll registers for the first shift from 1995 through 1999 do not reflect overtime distribution on all three shifts." Id. Defendant does not contend that the payroll registers reflect overtime distribution on all three shifts. See Defendant's SMF ¶ 26.

"In determining any motion for summary judgment, the court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are controverted by affidavit filed in opposition to the motion, or by other evidentiary materials which the court may consider under Rule 56 of the Federal Rules of Civil Procedure." D.R.I. Local R. 12.1(d); see also Anabell's Ice Cream Corp. v. Town of Glocester, 925 F.Supp. 920, 924 n.1 (D.R.I. 1996). The purpose of rules such as Local R. 12.1 is to provide courts with guidance and prevent their having to ferret through the entire record for disputed facts. See Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922, 931 (1st Cir. 1983); Cruz v. Radtec, Inc., 70 F.Supp.2d 77, 79 (D.P.R. 1999). The Court of Appeals for the First Circuit has cautioned that parties ignore such rules "at their peril." Ruiz Rivera v. Riley, 209 F.3d 24, 28 (1st Cir. 2000). Thus, except to the extent that they are properly controverted by Plaintiff's SDF and Plaintiff's Aff., the court takes the facts stated in Defendant's SMF as admitted. See Corrada Betances v. Sea-Land Serv., Inc., 248 F.3d 40, 43 (1st Cir. 2001); Ruiz Rivera, 209 F.3d at 28; Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86, 95 (1st Cir. 1996); Cruz, 70 F.Supp. 2d at 79; Annabel's Ice Cream Corp. v. Town of Glocester, 925 F.Supp. 920, 924 (D.R.I. 1996).

Delaware corporation, operates a factory in East Greenwich, Rhode Island, which manufactures staples. Plaintiff worked at Stanley's East Greenwich facility as a wire winder. He had been employed by Stanley since 1983 and worked on the first shift from 1995 until his discharge on June 21, 1999.

First shift began at 7:30 a.m. and ended at 3:30 p.m. Lunch break for first shift wire winders ran from 11:15 a.m. to 11:35 a.m. "Wash-up time" was five minutes before the meal break and the end of the shift. First shift wire winders were not to leave their work stations for lunch before 11:10 a.m. Plaintiff initialed a notice to that effect. Additionally, Stanley's policy was that employees who left the premises during their lunch break must receive permission from their supervisor and punch out. A notice reflecting this policy was posted in the wire winding department.[2] According to Stanley's employee handbook, leaving work during shift without permission was considered "unacceptable personal conduct which may lead to discipline and/or discharge." Affidavit of Richard Cramer in Support of Motion of Stanley-Bostitch, Inc. for Summary Judgment ("Cramer Aff."), Exhibit ("Ex.") A, Information for Hourly Employees at 16. Additionally, the handbook provided that "[f]alsifying personnel records, work production records, or intentionally making or assisting in making a false report," id., could also lead to disciplinary

[2] Although Stanley has included as an exhibit this notice which appears to bear Plaintiff's signature, see Affidavit of Richard Cramer in Support of Motion of Stanley-Bostitch, Inc. for Summary Judgment ("Cramer Aff."), Exhibit ("Ex.") B, Plaintiff disputes that the signature which appears on this document is his, see Transcript of Deposition of Thurston Horton on January 7, 2002 ("Plaintiff's Dep. Tr.") at 280. However, Plaintiff has provided no evidentiary support, in either Plaintiff's SDF or Plaintiff's Aff., for his contention that Stanley had no such policy.

action or discharge, see id.

On the morning of June 21, 1999, Daniel Lavoie, supervisor of the first shift wire winders ("Mr. Lavoie"), distributed scrap reports to six of the twelve first shift wire winders. According to Defendant, these six were to have meetings regarding excess scrap with Mr. Lavoie, Liz Huaman, the facility's Director of Human Resources ("Ms. Huaman"), John Viau, the facility's Quality Assurance Engineer ("Mr. Viau"), and Richard Cramer, the facility's Plant Operations Manager ("Mr. Cramer").[3] At 11:00 a.m.,[4] Mr. Cramer asked Mr. Lavoie to go to Plaintiff's work station to get Plaintiff. Plaintiff was neither at his wheel nor in the restroom. Mr. Lavoie returned to the conference room and informed Mr. Cramer and Ms. Huaman that he could not find Plaintiff. Mr. Lavoie and Mr. Cramer looked for Plaintiff in the cafeteria, to no avail, and passed Plaintiff's work station on their way back to the conference room. Ms. Huaman called to see if Plaintiff was at the nurse's office, but he was not. Announcements were made over the public address system, asking Plaintiff to report to the conference room. Mr. Lavoie and Mr. Healy then went to the parking lot to see if Plaintiff was there, but they found neither Plaintiff nor his car. Ultimately, they saw Plaintiff drive back onto the premises. Mr. Lavoie checked the time clock computer terminal to ascertain whether Plaintiff had clocked out before leaving, but Plaintiff had

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[3] Plaintiff contends that he was unaware he was scheduled to have a meeting regarding excess scrap. See Plaintiff's Aff. ¶ 2.

[4] Plaintiff states that he left his work station at 11:05 to go to the restroom. See Plaintiff's Aff. ¶ 3. However, resolution of the apparent discrepancy in times is not necessary to the court's disposition of this matter.

not.

Plaintiff states that at 11:05 he left his work station to use the restroom. He then proceeded to go to lunch. Plaintiff went to his car to eat his lunch and, on arriving in the parking lot, noticed that his tire needed air. He drove to a nearby gas station, put air in the tire, and returned to Stanley. Before leaving the premises, Plaintiff did not seek permission to do so or clock out.

When Plaintiff returned to his work area, he was called to the conference room. He was asked where he was at 11:00 when Mr. Lavoie went to Plaintiff's wheel to bring Plaintiff to his meeting and whether he had left company premises. Plaintiff explained where he had been and why. Based on Plaintiff's statement that he had left company property, Plaintiff was informed that he was being terminated for leaving his work area and company property without permission and without clocking out as well as for falsifying a company document.[5]

Previously, on September 11, 1997, Plaintiff had filed a charge of discrimination (the "1997 Charge") with the Rhode Island Commission for Human Rights ("RICHR"). Plaintiff alleged that from October 3, 1996, through September 11, 1997, he had been "subjected to discriminatory terms and conditions of employment, including unequal wages and treatment, by [his] employer ...." Affidavit of Michael L. Solitro in Support of

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[5] Plaintiff states that at this meeting he was informed that he was being terminated for leaving company property without permission, see Plaintiff's Aff. ¶ 6; Plaintiff's Dep. Tr. at 103, and that he was told about falsifying company documents after the fact, see Plaintiff's Dep. Tr. at 103. Whether or not Stanley at this meeting included falsifying company documents as a ground for Plaintiff's termination is immaterial to the court's resolution of this matter.

Objection to Defendant's Motion for Summary Judgment ("Solitro Aff."), Ex. B, 1997 Charge. Plaintiff alleged the following examples of discriminatory treatment: 1) an employee who referred to Plaintiff with a racial epithet was not disciplined by the supervisor; 2) Plaintiff was denied overtime which was instead granted to a non-minority coworker with less seniority; 3) Plaintiff was given unwarranted disciplinary warnings in retaliation for opposing discriminatory treatment; 4) the tire of Plaintiff's car was cut on May 19, 1997. See id. Plaintiff filed a Request for Notice of Right to Sue regarding the 1997 Charge with the RICHR on August 20, 1999. The Notice of Right to Sue was issued five days later.

Also on August 20, 1999, Plaintiff filed another charge of discrimination (the "1999 Charge") with the RICHR regarding his termination. Plaintiff alleged in the 1999 Charge that his termination was in retaliation "for filing a previous charge of race and color discrimination against [his] employer in that throughout my employment I have been treated in a demeaning and derogatory manner because of my race and color." Id., Ex. C, 1999 Charge. Plaintiff additionally claimed that the stated reason for his termination, failing to punch out for lunch and leaving company property, was pretextual. See id.

Plaintiff filed a Request for Notice of Right to Sue regarding the 1999 Charge on October 26, 2000. A Notice of Right to Sue was issued on November 20, 2000. Plaintiff subsequently filed a timely Complaint in state superior court. Plaintiff alleges that the adverse employment action taken by Defendant constitutes discriminatory and disparate treatment in violation of Title VII of the Civil Rights Act of 1964, as

amended, 42 U.S.C. §§ 2000e through 2000e-17, and 42 U.S.C. § 1981 (Count I), as well as the Rhode Island Fair Employment Practices Act, R.I. Gen. Laws §§ 28-5-3, 28-5-5 (Count II). Additionally, Plaintiff alleges that he has been subjected to a hostile work environment (Count III) and retaliation for his claims of discriminatory and disparate treatment in violation of the Civil Rights Act of 1990, R.I. Gen. Laws §§ 42-112-1, 42-112-2 (Count IV).[5] Plaintiff seeks compensatory and punitive damages, interest, and costs. Defendant removed the action to this court on March 8, 2001, and on April 3, 2001, filed its Answer to the Complaint. On February 19, 2002, Defendant filed the instant motion for summary judgment,[6] and Plaintiff filed his objection to Defendant's motion on March 5, 2002. The matter was subsequently referred to this Magistrate Judge. A hearing was conducted on April 29, 2002. After oral argument, the motion was taken under advisement.

**Law**

When determining a motion for summary judgment, a court must review the evidence in the light most favorable to the

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[5] Plaintiff also originally alleged that Defendant's conduct constituted the tort of intentional infliction of emotional distress (Count V). Plaintiff has since withdrawn the intentional infliction of emotional distress count. See Memorandum of Stanley-Bostitch, Inc. in Support of its Motion for Summary Judgment ("Stanley's Mem.") at 1 n.1; Memorandum in Support of Plaintiff's Objection to Summary Judgment ("Plaintiff's Mem.") at 4.

[6] In the alternative, Defendant seeks an order stating either that Plaintiff's ability to recover lost wages ceased as of June, 2000, when he was arrested, incarcerated, and discharged from subsequent employment or, at least, by November, 2001, when Plaintiff was convicted of a felony and again incarcerated. See Stanley's Mem. at 1, 13-14. Given the court's recommendation that the motion for summary judgment be granted, the court need not address Defendant's alternative request.

nonmoving party and draw all reasonable inferences in the nonmoving party's favor. See Mesnick v. Gen. Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991); Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990). Summary judgment should be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1116 (1st Cir. 1993); Lawrence v. Northrop Corp., 980 F.2d 66, 68 (1st Cir. 1992). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment ...." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Rather, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248, 106 S.Ct. at 2510.

Where the non-movant bears the ultimate burden of proof, he must present affirmative evidence to rebut the motion. See id. at 256-57, 106 S.Ct. at 2514. "Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990); see also Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86, 95 (1st Cir. 1996). Evidence that is merely colorable or is not significantly probative cannot defeat summary judgment. See Anderson, 477 U.S. at 249-50, 106 S.Ct. at 2511.

## Discussion

### I. The 1997 Charge

Plaintiff alleged in the 1997 Charge that he "ha[d] been subjected to discriminatory terms and conditions of employment, including unequal wages and treatment, by [his] employer, Stanley-Bostitch, Inc., since on or about October 6, 1996." Solitro Aff., Ex. B. The specific incidents cited by Plaintiff in the 1997 Charge are reflected in the Complaint, see Complaint ¶¶ 10-11, and according to Plaintiff constitute a hostile work environment, see id. ¶¶ 20-22; Memorandum in Support of Plaintiff's Objection to Summary Judgment ("Plaintiff's Mem.") at 10. However, Stanley argues that "[t]hose claims are time barred since Plaintiff did not file suit within 90 days[7] of receiving a right to sue letter on that 1997 charge and did not include them in his second charge filed in August, 1999, to challenge his discharge." Memorandum of Stanley-Bostitch, Inc. in Support of its Motion for Summary Judgment ("Stanley's Mem.") at 2. Plaintiff counters that "Plaintiff's 1997 discrimination charge was still pending before the Rhode Island Commission [for] Human Rights on the filing of the second charge," Plaintiff's Mem. at 6, and that the 1999 Charge "acted to amend Plaintiff's claims by adding his retaliatory discharge," id. at 10.

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[7] Pursuant to the enforcement provisions of Title VII:

> [T]he Commission ... shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved ...."

42 U.S.C. 200e-5(f)(1) (1994). The Rhode Island Fair Employment Practices Act ("FEPA") contains the same ninety day limit. See R.I. Gen. Laws § 28-5-24.1 (2000).

Plaintiff also argues that Stanley admitted that the "claims made in his 1999 Charge of Discrimination were also contained in the Plaintiff's Complaint." Id. Thus, in Plaintiff's view, these claims are not time barred. See id.

Plaintiff's own actions undermine his argument. It is undisputed that on the same date on which Plaintiff filed the 1999 Charge with the RICHR, August 20, 1999, see Stanley's SMF ¶ 40, he also requested a Notice of Right to Sue regarding the 1997 Charge, see Affidavit of Erik J. Winton in Support of Motion of Stanley-Bostitch, Inc. for Summary Judgment ("Winton Aff."), Ex. C, Request for Notice of Right to Sue dated August 20, 1999; Solitro Aff., Ex. D (same). The Notice of Right to Sue pertaining to the 1997 Charge is dated August 25, 1999. See Solitro Aff., Ex. E, Notice of Right to Sue ("1997 Notice"). Plaintiff stated during his deposition that he received the 1997 Notice, which he understood gave him the right to sue if he filed an action within ninety days, and informed his attorney. See Transcript of Deposition of Thurston Horton of January 7, 2002 ("Plaintiff's Dep. Tr.") at 162-63, 167; see also Stanley's SMF ¶ 36. It is also undisputed that Plaintiff failed to bring a lawsuit based on the 1997 Charge within ninety days of receiving the 1997 Notice. See Stanley's SMF ¶ 36; Plaintiff's Dep. Tr. at 163. Thus, the claims contained within the 1997 Charge are time barred. See Rice v. New England Coll., 676 F.2d 9, 11 (1st Cir. 1982)(refusing to extend ninety day period by one day and affirming district court's dismissal of complaint as time barred).

The court is also not persuaded that Stanley "admitted" the Complaint contained the same claims made in the 1999 Charge.

Plaintiff's Mem. at 10. The Complaint reads as follows:

> Plaintiff filed an appropriate Charge of Discrimination with the Rhode Island Commission for Human Rights [hereinafter "RICHR"], which was assigned Charge No. 00ERT 039-06/16. The foregoing Charge of Discrimination charged the Defendant with the acts of discrimination and retaliatory discharge alleged in this complaint. A true and correct copy of the aforementioned Charge of Discrimination is attached to this Complaint as Exhibit "A."

Complaint ¶ 1. Plaintiff refers to the Answer and Affirmative Defenses of Defendant Stanley-Bostitch, Inc. ("Stanley's Answer"), which states that:

> Stanley denies Plaintiff's Charge of Discrimination was "appropriate." Stanley is without sufficient knowledge or information upon which to form a belief as to the truth of the allegation that a "true and correct copy" of the Charge of Discrimination is attached to the complaint, and therefore leaves Plaintiff to his proof. **Stanley admits the remaining allegations of this paragraph**.

Stanley's Answer ¶ 1 (emphasis added). However, it is unreasonable to infer that by this paragraph Stanley admitted that the 1999 Charge contained **all** of the claims alleged in the Complaint, especially in light of the fact that elsewhere in the Answer Stanley specifically denies the allegations in ¶¶ 9-12 of the Complaint, which include Plaintiff's claims of discriminatory treatment in wages and overtime as well as hostile work environment, see Answer ¶¶ 9-12. Stanley also specifically denies the allegations in Count III, the hostile work environment count. See id. ¶¶ 19-22. Finally, Stanley's sixth affirmative defense is that "Plaintiff's complaint is barred, in whole or in part, by the applicable statute of limitations." Answer at 4. Thus, the court concludes Stanley has not conceded that the 1999 Charge included all of the

allegations of the Complaint.

Plaintiff cannot resurrect the claims contained within the 1997 Charge by contending that he realleged them in the 1999 Charge. See Vitello v. Liturgy Training Publ'ns, 932 F.Supp. 1093, 1098 (N.D. Ill. 1996). As the court in Vitello found, "[t]o allow a plaintiff to re-allege an earlier EEOC charge in a subsequent EEOC charge would render the 90-day time limit for filing lawsuits 'meaningless,' because it would allow the plaintiff to 'evade [the filing requirement] simply by seeking additional Notices of Right to Sue whenever [he] pleased.'" Id. (quoting Lo v. Pan Am. World Airways, Inc., 787 F.2d 827, 828 (2nd Cir. 1986))(alterations in original); cf. Joseph v. Wentworth Inst. of Tech., 120 F.Supp.2d 134, 140 (D. Mass. 2000)(holding that plaintiff's claim was barred because it was neither included in nor reasonably expected to grow out of her administrative charge). In Joseph, the court stated that "in employment discrimination cases the scope of the civil complaint is ... limited by the charge filed by the EEOC and the investigation which can reasonably be expected to grow out of that charge." Joseph, 120 F.Supp.2d at 140 (quoting Lattimore v. Polaroid Corp., 99 F.3d 456, 464 (1st Cir. 1996))(alteration in original). "Claims in a complaint are not like or reasonably related to allegations in an EEOC charge unless a factual relationship exists between them. That is, the EEOC charge and the complaint must, at a minimum, describe the *same conduct* and implicate the *same individuals*." Vitello v. Liturgy Training Publ'ns, 932 F.Supp. 1093, 1099 (N.D. Ill. 1996)(quoting Harper v. Godfrey Co., 45 F.3d 143, 148 (7th Cir. 1995)(internal quotation marks omitted).

Such is not the case here. The 1997 charge alleged that Plaintiff had been subjected to: 1) discriminatory treatment,

namely unequal distribution of overtime; 2) a hostile work environment, specifically the alleged failure to discipline an employee who used a racial epithet in reference to Plaintiff and a tire slashing incident; and 3) retaliation, in the form of unwarranted disciplinary warnings, for opposing discriminatory treatment. See Solitro Aff., Ex. B, 1997 Charge. Although Plaintiff indicated in the 1999 Charge that the violation was "continuing," id., Ex. C, 1999 Charge, he listed June 21, 1999, as the date the discrimination both began and ended, and the only incident mentioned in the 1999 Charge is Plaintiff's termination on June 21, 1999, see id. Thus, the two charges cannot be said to contain the same conduct, see Vitello, 932 F.Supp. at 1099 (noting that "[t]he two instances of retaliation were separate and distinct events, as shown by the fact that [the plaintiff] filed separate EEOC charges for each instance of retaliation" and thus were not reasonably related to each other), and there is no allegation that the same individuals were involved, see id.

The ninety day limit contained in 42 U.S.C. § 2000e-5(f)(1) has been held to be a statute of limitations, not a jurisdictional prerequisite, and, as such, it is subject to equitable tolling. See Rice v. New England Coll., 676 F.2d 9, 10 (1st Cir. 1982)(citing Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982)(holding clause in preceding section, 42 U.S.C. § 2000e-5(e), setting 180 day limit for filing charge with agency, was a mere period of limitation which could be waived or extended for equitable considerations)). Accordingly, the court addresses the question of whether there is any ground for equitable tolling of the statute of limitations. However, the court is mindful

of the First Circuit's admonition that "[f]ederal courts should not apply equitable tolling liberally to extend time limitations in discrimination cases." Chico-Velez v. Roche Prods., Inc., 139 F.3d 56, 58-59 (1st Cir. 1998); see also Rys v. U.S. Postal Serv., 886 F.2d 443, 446 (1st Cir. 1989)(noting that courts should take a "narrow view" of equitable exceptions to Title VII limitations periods).

Plaintiff here has made no showing that there is any basis to toll the ninety day statute of limitations. Rather, he acknowledged that he requested and received the First Notice, told his attorney about it, and did not bring suit against Stanley based on the 1997 Charge. See Plaintiff's Dep. Tr. at 163-167. When asked why he did not sue Stanley at that point, Plaintiff replied that "I didn't feel that I had to at the time. I didn't want to, how you say, create more of a bad, bad feeling towards Bostitch and myself. So I didn't bring forth any lawsuit. I still had my job." Id. at 164. The purpose of equitable tolling is not to give plaintiffs who have deliberately bypassed an opportunity to file suit a second chance to do so. Thus, the court concludes that there is no reason to toll the ninety day statute of limitations and that the claims contained in the 1997 Charge are time barred. See Rice v. New England Coll., 676 F.2d 9, 11 (1st Cir. 1982). Accordingly, the court recommends that summary judgment be granted as to all claims contained in the 1997 Charge.[8]

[8] The court notes that 42 U.S.C. § 1981 does not contain the ninety day statute of limitations contained in Title VII. The statute of limitations for § 1981 has been held to be the same as the state statute of limitations for personal injury actions, see Johnson v. Rodriguez, 943 F.2d 104, 107 (1st Cir. 1991)(citing Goodman v. Lukens Steel Co., 482 U.S. 656, 662, 107 S.Ct. 2617, 2621, 96 L.Ed.2d 572 (1987)), in this case three years, see R.I. Gen. Laws § 9-1-14.

## II. The 1999 Charge

In the 1999 Charge, Plaintiff stated that:

> I believe I have been retaliated against for filing a previous charge of race and color discrimination against my employer in that throughout my employment I have been treated in a demeaning and derogatory manner because of my race and color .... I believe the reason for my termination was pretext and done so in retaliation.

Solitro Aff., Ex. C, 1999 Charge. Plaintiff alleges in the Complaint that the adverse employment action taken by Stanley violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e through 2000e-17, 42 U.S.C. § 1981,[9] the Fair

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Thus, any § 1981 claims which occurred prior to the filing of the 1997 Charge are time barred. To the extent that Plaintiff alleges discriminatory treatment in overtime or wages and hostile work environment subsequent to the filing of the 1997 Charge, these claims were not contained within the 1999 Charge and Plaintiff cannot expand on that charge here. See Lattimore v. Polaroid Corp., 99 F.3d 456, 464 (1st Cir. 1996)); see also Joseph v. Wentworth Inst. of Tech., 120 F.Supp.2d 134, 140 (D. Mass. 2000).

[9] Section 1981 provides, in relevant part:

> **(a) Statement of equal rights**
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens ....
>
> **(b) "Make and enforce contracts" defined**
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

42 U.S.C. § 1981 (1994).

Employment Practices Act ("FEPA"),[10] R.I. Gen. Laws. §§ 28-5-3 through 28-5-5, and the Rhode Island Civil Rights Act of 1990 ("RICRA"),[11] R.I. Gen. Laws §§ 42-112-1 through 42-112-2. See Complaint ¶¶ 14, 17, 24.

**A. Discriminatory Treatment**

In cases such as the instant action, where there is no direct or statistical evidence of discrimination, the United

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[10] FEPA provides, in relevant part:

> It is an unlawful employment practice:
> (1) For any employer:
> (i) To refuse to hire any applicant for employment because of his or her race or color, religion, sex, disability, age, sexual orientation, gender identity or expression or country of ancestral origin;
> (ii) Because of these reasons, to discharge an employee or discriminate against him or her with respect to hire, tenure, compensation, terms, conditions or privileges of employment, or any other matter directly or indirectly related to employment ....

R.I. Gen. Laws § 28-5-7 (2001).

[11] The Rhode Island Civil Rights Act of 1990 ("RICRA") provides, in relevant part:

> (a) All persons within the state, regardless of race, color, religion, sex, disability, age, or country of ancestral origin, have, except as is otherwise provided or permitted by law, the same rights to make and enforce contracts, to inherit, purchase, to lease, sell, hold, and convey real and personal property, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property ....
> (b) For the purposes of this section, the right to "make and enforce contracts, to inherit, purchase, to lease, sell, hold, and convey real and personal property" includes the making, performance, modification and termination of contracts and rights concerning real or personal property, and the enjoyment of all benefits, terms, and conditions of the contractual and other relationships.

R.I. Gen. Laws § 42-112-1 (1998).

States Supreme Court has applied a three-step burden shifting approach.[12] See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973). First, the plaintiff must establish a prima facie case of racial discrimination. See Burdine, 450 U.S. at 252-53, 101 S.Ct. at 1093; McDonnell Douglas Corp., 411 U.S. at 802, 93 S.Ct. at 1824. In an employment termination action, a prima facie case consists of a showing that: 1) the plaintiff is within a protected class; 2) he was qualified for his position, and performing his job at a level that met the employer's

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[12] Although the McDonnell Douglas-Burdine burden-shifting framework was developed in the Title VII context, courts have utilized the burden-shifting formula in § 1981 claims as well. See Oliver v. Digital Equip. Corp., 846 F.2d 103, 111 (1st Cir. 1988)("When a plaintiff seeking to establish a claim pursuant to section 1981 offers indirect proof of purposeful discrimination, the *McDonnell Douglas* formulation applies."); Joseph v. Wentworth Inst. of Tech., 120 F.Supp.2d 134, 144 (D. Mass. 2000)(same). Additionally, the Rhode Island Supreme Court has applied the analytical framework developed in the Title VII context to actions brought under FEPA. See Marley v. U.P.S., Inc., 665 F.Supp. 119, 128 (D.R.I. 1987)("Because the Rhode Island Fair Employment Practices Act is nearly identical in its remedial provision to its federal analog, Title VII, the Rhode Island Supreme Court has applied the analytical framework developed in federal Title VII cases to actions brought pursuant to the Rhode Island statute.")(footnote omitted); Newport Shipyard, Inc. v. Rhode Island Comm'n for Human Rights, 484 A.2d 893, 898 (R.I. 1984)(holding that the trial justice "should have looked for guidance in this sensitive area to decisions of the federal courts in construing Title VII of the Civil Rights Act of 1964."); Narragansett Elec. Co. v. Rhode Island Comm'n for Human Rights, 374 A.2d 1022, 1023 (R.I. 1977)(noting the similarity between FEPA and Title VII and observing that "we think it appropriate in this case to refer to federal decisions dealing with Title VII."). Finally, the RICRA is modeled after 42 U.S.C. § 1981. See Wyss v. General Dynamics Corp., 24 F.Supp.2d 202, 210 (D.R.I. 1998). Thus, the court need not undertake separate analyses regarding the merits of Plaintiff's claims under each statute.

legitimate expectations; 3) he was nonetheless dismissed; and 4) after his departure, the employer sought someone of roughly equivalent qualifications to perform substantially the same job. See Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000). A presumption of discrimination arises upon establishment of a prima facie case. See Ruiz v. Posadas de San Juan Assocs., 124 F.3d 243, 248 (1st Cir. 1997).

At step two, the employer must articulate a legitimate, nondiscriminatory reason for its action. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973); see also Ruiz, 124 F.3d at 248 ("In order to rebut the presumption that arises upon the establishment of a prima facie case--i.e. that the employer engaged in intentional age-based discrimination--the employer need only produce enough competent evidence, taken as true, to enable a rational factfinder to conclude that there existed a nondiscriminatory reason for the challenged employment action.")(citations omitted). The presumption of discrimination then "drops out of the picture." Woodman v. Haemonetics Corp., 51 F.3d 1087, 1091 (1st Cir. 1995) (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993)).

Finally, the plaintiff must be afforded an opportunity to show that the employer's stated reason is, in fact, pretext. Burdine, 450 U.S. at 253, 101 S.Ct. at 1093; McDonnell Douglas Corp., 411 U.S. at 804, 93 S.Ct. at 1825. At step three, the plaintiff must demonstrate both that the defendant's stated reason is pretextual and that the real reason is

discrimination. See Hicks, 509 U.S. at 515, 113 S.Ct. at 2752; Cruz-Ramos v. Puerto Rico Sun Oil Co., 202 F.3d 381, 384 (1st Cir. 2000). The same evidence may be used to support both the conclusion that the defendant's stated reason is false and that the real reason is discrimination, "provided that the evidence is adequate to enable a rational factfinder reasonably to infer that unlawful discrimination was a determinative factor in the adverse employment action." Thomas v. Eastman Kodak Co., 183 F.3d 38, 57 (1st Cir. 1999). The burden of persuasion remains with the plaintiff at all times. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981); Thomas, 183 F.3d at 56; see also Connell v. Bank of Boston, 924 F.2d 1169, 1177 (1st Cir. 1991)("The [employer], however, does not bear the burden of proving that it did not discriminate. Rather, [the plaintiff] must prove that it did.").

Plaintiff, an African-American, is a member of a protected class. Although Stanley contends that Plaintiff's alleged policy violations rendered him unqualified for his position, see Stanley's Mem. at 4-5,[13] the court is not persuaded by this argument.[14] There is no evidence that in the

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[13] Stanley did not press this argument at the April 29, 2002, hearing.

[14] The court also considers the fact that Stanley has moved on to the second step of the McDonnell Douglas-Burdine formula and offered a legitimate, nondiscriminatory reason for terminating Plaintiff. See United States Postal Bd. of Governors v. Aikens, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983)("Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant."); Oliver v. Digital Equip. Corp., 846 F.2d 103, 107 (1st Cir. 1988)(noting that the court "need not linger long over the question of whether [the plaintiff] in fact established a *prima facie* case if the defendant has met its

sixteen years prior to June 21, 1999, Stanley found Plaintiff to be unqualified. Plaintiff alleges that he was qualified for the job. See Complaint ¶ 8. The court finds this allegation sufficient for purposes of establishing a prima facie case. Plaintiff was terminated on June 21, 1999. Presumably, Stanley hired a similarly qualified person to replace Plaintiff.[15] Plaintiff, therefore, has made out a prima facie case of discrimination.

At step two, Stanley has articulated a legitimate, nondiscriminatory reason for Plaintiff's termination. Stanley states that Plaintiff was fired for violating company policies, namely for falsifying company documents and for leaving his work area and company property without permission and without clocking out. See Stanley's SMF ¶ 17; Stanley's Mem. at 5. Stanley further notes that four white employees, one prior to Plaintiff's termination and three subsequently, were dismissed for the same or similar reasons. See Stanley's SMF ¶¶ 18-20; see also Affidavit of James C. Healy III in Support of Motion of Stanley-Bostitch, Inc. for Summary Judgment ("Healy Aff."), Ex. A, B. Thus, Stanley has satisfied its burden of production at step two. See Oliver v. Digital Equip. Corp., 846 F.2d 103, 108 (1st Cir. 1988)("To meet its burden, defendant is not required to persuade a trier of fact that it was in fact motivated by the proffered reason and not a nondiscriminatory one. Defendant's burden is one of

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burden of articulating a legitimate nondiscriminatory reason for its actions.")(alteration in original)(citation and internal quotation marks omitted).

[15] Neither party has provided information on this point. However, Stanley does not contest that Plaintiff has made his prima facie case as to this aspect of the McDonnell Douglas-Burdine formula.

production, not persuasion. It must only articulate a valid reason."); see also Mesnick v. Gen. Elec. Co., 950 F.2d 816, 823 (1st Cir. 1991).

Plaintiff alleges that Stanley's stated reason for firing him is pretextual and that "race was a substantial and determining factor in the decision by defendant Stanley-Bostitch Inc. to terminate him from employment." Complaint ¶ 12. In addition to his contention that the termination was retaliatory, to be discussed infra, Plaintiff argues that: 1) Stanley has not set forth facts which demonstrate that the white employees were terminated for similar reasons, see Response of Thurston Horton to Defendant's Reply Memorandum to Objection for Summary Judgment ("Plaintiff's Response") at 3; 2) Stanley has not provided facts which demonstrate that the other employees fired were "similarly situated" to Plaintiff, Plaintiff's Mem. at 9; and 3) Stanley failed "to implement its affirmative action program in the application of progressive discipline procedures," thereby denying Plaintiff equal protection of the laws in contravention of Stanley's policy and the RICRA, Plaintiff's Mem. at 9; see also Plaintiff's Response at 3.[16]

Contrary to Plaintiff's assertion, Stanley has set forth facts which demonstrate that the four white employees were terminated for similar infractions as was Plaintiff. Stanley states that the first employee was fired on April 30, 1999, "for falsifying Company records by leaving his work station

[16] The court notes that Plaintiff initially makes this argument in the context of the retaliation claim. See Plaintiff's Mem. at 9. However, since the court must review the evidence in the light most favorable to Plaintiff, and because the court need not reach this argument in the context of the retaliation claim, the court addresses it here.

without permission and failing to clock out." Stanley's SMF ¶ 18; see also Healy Aff., Ex. A. According to Stanley, the second and third were terminated on February 5, 2000, for "leaving company grounds without punching out." Stanley's SMF ¶ 19; see also Healy Aff., Ex. B. Finally, Stanley avers that the fourth was dismissed on July 18, 2000, "for falsifying company records by failing to clock out when leaving the building." Stanley's SMF ¶ 20; see also Healy Aff., Ex. B. Stanley has included as exhibits the employee change and/or termination forms which indicate the reasons for these employees' termination. See Healy Aff., Ex. A, B. Clearly, the stated reasons for the termination of these white employees are similar to the explanation given for Plaintiff's termination. Plaintiff has provided no evidence to demonstrate that the above statements and exhibits are false.

Plaintiff's contention that Stanley has not shown that the fired white employees were similarly situated to Plaintiff is unclear. He merely states that "three of the employees were terminated after Plaintiff's termination and one before his termination." Plaintiff's Mem. at 9. However, the court does not see why the timing is material. The individuals in question were all employed at Stanley's Rhode Island facility. See Stanley's SMF ¶¶ 18-20. In fact, three worked in the staple department, see id. ¶¶ 19-20, as did Plaintiff. If Plaintiff is attempting to claim that these individuals had received more disciplinary warnings and/or suspensions than Plaintiff, he has failed to put forth evidence to support this contention. In short, Plaintiff has provided no evidence from which the court could reasonably infer that the individuals were not similarly situated.

Plaintiff's affirmative action argument is also unclear.

Plaintiff states that "Defendant had in place at the time of Plaintiff's discharge a progressive discipline policy which established the method and manner of discipline that employees could receive. The Defendant denied the Plaintiff the application of this discipline Policy and therefore the benefit of an equal employment opportunity and affirmative action program." Plaintiff's Response at 3; see also Plaintiff's Mem. at 9-10. According to Plaintiff, he warranted a "level 3 step" in Stanley's progressive discipline procedure which authorized only a suspension. See Plaintiff's Mem. at 10. Thus, in Plaintiff's view, the fact that Stanley terminated rather than suspended Plaintiff for alleged policy violations demonstrates pretext. See id. at 9-10.

It is true that Stanley had adopted an affirmative action program. The employee handbook, cited by Plaintiff, includes the following provision:

> It has always been our policy to administer all personnel actions concerning recruitment, hiring, wages, benefits, transfers, promotions, layoff, recall, training, education, social and recreational programs without regard to age, race, color, religion, sex, national origin, or physical or mental disability. In order to further our goal of equal employment opportunity for all employees, we have initiated an[] Affirmative Action Program through which positive steps are being taken to help minority groups and women achieve equality in all areas of employment.

Cramer Aff., Ex. A at 5. The handbook, in the "Rules and Conduct" section, also states that:

> Violations of the policies and procedures contained in this Handbook may subject an employee to disciplinary action by the Company. While the Company anticipates and hopes that discipline of an employee will seldom be necessary, employees have the right to be aware of those infractions **which could lead to discipline and/or dismissal from employment**. **In deciding whether**

> **and how much discipline to impose, the Company takes into account factors including, but not limited to, the severity of the infraction, the employee's overall record of job performance and attitude.** The rules contained in this Section ... will be implemented by the Company in a fair and nondiscriminatory manner.

Id. at 15 (emphasis added). The employee handbook contains a list of rules and regulations which "while neither exhaustive nor all inclusive applies to all employees and provides examples of unacceptable personal conduct **which may lead to discipline and/or discharge**." Id. at 16 (emphasis added). Among the examples given are falsifying personnel records and leaving work during shift without permission. See id. Plaintiff acknowledged receipt of a copy of the employee handbook during his deposition. See Plaintiff's Dep. Tr. at 255.

There is no indication in the "Rules and Conduct" section—or, indeed, anywhere else in the employee handbook—that Stanley was required to follow progressive steps in disciplining employees for various infractions. On the contrary, the handbook suggests that decisions regarding discipline were discretionary. Moreover, it appears to the court, from the undisputed evidence presented, that Stanley made those decisions in a nondiscrimina- tory manner, evidenced by the fact that it imposed the same discipline, termination, on four other, white employees for the same or similar infractions as Plaintiff. The court concludes that Plaintiff has not shown how his dismissal violated Stanley's affirmative action policy in any way.

Plaintiff has not demonstrated that Stanley's stated reasons for firing Plaintiff are pretextual. See York v. Mobil Oil Corp., No. 89-CV-1405, 1991 WL 53337, at *1

(N.D.N.Y. Jan. 18, 1991)("The question here presented is not whether in fact plaintiff violated company policy, but whether his termination was the result of racial animus. Mobil has met its burden of articulating a legitimate, nondiscriminatory reason for the termination. It then becomes plaintiff's burden to raise a question of fact concerning whether the reasons offered by Mobil are merely pretextual. This Court finds plaintiff's proffers on this issue inadequate."). Plaintiff admitted that he left Stanley's premises without permission and without clocking out, see Stanley's SMF ¶ 17; Plaintiff's Dep. Tr. at 91, 103, 250, thereby falsifying his time card. Both infractions are described in the employee handbook, a copy of which Plaintiff acknowledged receiving, as "unacceptable personal conduct" which could, in Stanley's discretion, "lead to discipline and/or discharge." Cramer Aff., Ex. A at 16. Stanley states that it terminated four white employees, three from Plaintiff's department, for the same or similar infractions. See Van Meter v. Jefferson Smurfit Corp., No. 1:95-CV-1274-MHS, 1996 U.S. Dist. LEXIS 17388, at *27 (N.D. Ga. July 1, 1996)(considering fact that defendant had shown that seven other employees, of different race and national origin than plaintiff, were terminated for the same infraction), aff'd, 1996 U.S. Dist. LEXIS 17516, at *1 (N.D. Ga. Aug. 22, 1996) (adopting recommendation of magistrate judge that defendant's motion for summary judgment be granted); York v. Mobil Oil Corp., 1991 WL 53337, at *2 (N.D.N.Y. Jan. 18, 1991)(noting that defendant discussed termination of six non-minority employees for same infraction as plaintiff). Plaintiff has provided no evidence from which the court could reasonably infer that discrimination motivated Stanley when it dismissed Plaintiff. Cf. Mesnick v. Gen.

Elec. Co., 950 F.2d 816, 825 (1st Cir. 1991) ("Courts may not sit as super personnel departments, assessing the merits--or even the rationality--of employers' nondiscrimina- tory business decisions.").

In opposing a motion for summary judgment, "[i]t is axiomatic that more is required than mere conclusory allegations and unsupported conjecture." Ruiz v. Posadas de San Juan Assocs., 124 F.3d 243, 249 n.9 (1st Cir. 1997). Plaintiff, the nonmoving party here, has not produced affirmative evidence in support of his contention that Defendant's stated reason for his termination was a pretext for discrimination. Plaintiff clearly has not met his burden of demonstrating that there exists a genuine issue of material fact as to whether Defendant's stated reasons are pretextual and that discriminatory treatment was the true reason for his termination, but has simply put forth conclusory allegations and conjecture. See Ruiz, 124 F.3d at 249 n.9.

**B. Retaliation**

Plaintiff alleges that his termination was "retaliat[ion] for prior complaints of discrimination made by the plaintiff." Complaint ¶ 11. Specifically, Plaintiff observes that at the time of his termination he had a charge of discrimination pending before the RICHR and had recently had a meeting regarding his grievances with Ms. Huaman. See Plaintiff's Response at 5; see also Plaintiff's Aff. ¶ 8. Such claims "typically invite analysis under the framework first established by the Supreme Court in McDonnell Douglas Corp v. Green." Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 262 (1st Cir. 1999)(citation omitted). To state a prima facie case of retaliation, Plaintiff must show: 1) protected participation or opposition under Title VII that is known by

the alleged retaliator; 2) employment action(s) disadvantaging persons engaged in protected activities; and 3) a causal connection between the first two elements, i.e. a retaliatory motive which plays a part in the adverse employment action(s). See Hazel v. U.S. Postmaster Gen., 7 F.3d 1, 3 (1st Cir. 1993); see also Petitti v. New England Tel. & Tel. Co., 909 F.2d 28, 33 (1st Cir. 1990). "If the employer then responds by proffering a legitimate, nonretaliatory reason for the discharge, the employee must adduce some significantly probative evidence showing both that the proffered reason is pretextual and that a retaliatory animus sparked his dismissal." Higgins, 194 F.3d at 262. In the instant case, Plaintiff has failed to make out a prima facie case of retaliation.

Clearly, Plaintiff's filing of the 1997 Charge constitutes protected activity. There is also no question that Plaintiff suffered a disadvantageous employment action, his termination on June 21, 1999. Stanley contends that the alleged retaliators were not aware of Plaintiff's protected activity, see Stanley's Mem. at 7, and that "Plaintiff cannot demonstrate a causal connection between the [1997] charge and his termination of employment," id.

Plaintiff does not dispute that the persons responsible for the decision to terminate Plaintiff were Mr. Cramer and Ms. Huaman. See Stanley's SMF ¶¶ 16-17; Cramer Aff. ¶ 17; Healy Aff. ¶¶ 10, 13. Nor does Plaintiff dispute Mr. Cramer's statement that "[p]rior to Plaintiff's termination, I had no knowledge whatsoever of any charge of discrimination Plaintiff may have filed against Stanley. It was only after we advised Plaintiff of his termination that he mentioned the charge he had brought. That was the first I had ever heard of such a

charge." Cramer Aff. ¶ 19; see also Stanley's SMF ¶ 35. Indeed, Plaintiff testified at his deposition that he did not tell either Mr. Cramer or Ms. Huaman about the 1997 Charge until after he had been terminated. See Plaintiff's Dep. Tr. at 104-05.

Moreover, the fact that Mr. Cramer and Ms. Huaman had no knowledge of the 1997 Charge is confirmed by Alan Teixeira ("Mr. Teixeira"), the manager of human resources at Stanley's Rhode Island facility, where Plaintiff worked, at the time Plaintiff filed the 1997 Charge with the RICHR. See Affidavit of Alan F. Teixeira in Support of Motion of Stanley-Bostitch, Inc. for Summary Judgment ("Teixeira Aff.") ¶¶ 2, 6-7. Mr. Teixeira states that he received a copy of the 1997 Charge and helped Stanley's attorneys prepare its response. See id. ¶ 3. After completing and forwarding Stanley's response to the RICHR, Mr. Teixeira kept materials relating to the 1997 Charge and Stanley's response in a separate file, apart from Plaintiff's personnel records, and did not recall ever speaking to anyone regarding the 1997 Charge. See id. ¶¶ 4-5, 9. Specifically, Mr. Teixeira states that although he had met Mr. Cramer, he "never discussed Plaintiff's claim with him, nor did I have any reason to." Id. ¶ 6. Regarding Ms. Huaman, Mr. Teixeira affirms that he "ha[s] never met her or spoken to her about Plaintiff's charge or anything else." Id. ¶ 7. When Mr. Teixeira left Stanley's employ, the company had not hired his replacement, and, as a result, there was no one to brief regarding the 1997 Charge. See id. ¶ 8. Plaintiff has not disputed any of the above evidence, stating during his deposition that he did not know who at Stanley was aware of the 1997 Charge because he had not discussed it with anyone there. See Plaintiff's Dep. Tr. at 105.

Plaintiff does allege that he had a meeting with Ms. Huaman approximately one week before his discharge, at which he discussed some of his grievances regarding overtime and seniority. See Plaintiff's Aff. ¶ 8. Plaintiff also explained to Ms. Huaman his feeling that his supervisor, Mr. Lavoie, was harassing him. See id. Plaintiff stated during his deposition that he believes that Ms. Huaman told Mr. Lavoie what Plaintiff had said to her in confidence. See Plaintiff's Dep. Tr. at 194-95. Otherwise, Plaintiff testified that he had no problems with Ms. Huaman. See id. at 195. Nowhere does Plaintiff state that he informed Ms. Huaman about the 1997 Charge at this meeting. In fact, as noted previously, Plaintiff stated during his deposition that he did not tell Ms. Huaman about the 1997 Charge until after he was discharged. See Plaintiff's Dep. Tr. at 104. Thus, despite the temporal proximity of Plaintiff's meeting with Ms. Huaman and his termination, there is no evidence that Ms. Huaman was aware of Plaintiff's protected activity when she participated in the decision to terminate him on June 21, 1999.

The court concludes that Plaintiff has not shown that either Mr. Cramer or Ms. Huaman, the Stanley employees who made the decision to terminate Plaintiff, was aware that he had filed the 1997 Charge. See Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 67 (1st Cir. 2002)(noting, in Title IX case using Title VII framework for retaliation, that plaintiffs had not alleged that defendant knew they had complained about her behavior and, therefore, plaintiffs' retaliation claim foundered).

More importantly, Plaintiff has provided absolutely no evidence of a retaliatory motive on the part of Mr. Cramer or Ms. Huaman which played a part in the decision to terminate

Plaintiff. See Hazel v. U.S. Postmaster General, 7 F.3d 1, 3 (1st Cir. 1993); see also Petitti v. New England Tel. & Tel. Co., 909 F.2d 28, 33 (1st Cir. 1990). Plaintiff has not disputed the statements in Stanley's SMF and supporting affidavits that the meeting on June 21, 1999, with Mr. Cramer and Ms. Huaman arose after Plaintiff could not be found at his work station or anywhere on Stanley property and that Plaintiff was terminated after he admitted that he had left the premises without permission and without clocking out. See Stanley's SMF ¶¶ 11-14, 16-17; Cramer Aff. ¶¶ 8, 15, 17; Healy Aff. ¶¶ 3, 5, 11-12; Lavoie Aff. ¶¶ 12, 15, 18, 20-22. Thus, the court cannot reasonably infer that Mr. Cramer and Ms. Huaman, who had no knowledge of the 1997 Charge, were motivated by a desire to retaliate against Plaintiff.

Additionally, the length of time—almost two years—between the filing of the 1997 Charge and Plaintiff's termination suggests a lack of retaliatory animus on Stanley's part. Although "[p]roof of causal connection in a retaliation claim can be established indirectly by showing that the protected activity was followed closely by discriminatory treatment," York v. Mobil Oil Corp., No. 89-CV-1405, 1991 WL 53337, at *3 (N.D.N.Y. Jan. 18, 1991); see also Oliver v. Digital Equip. Corp., 846 F.2d 103, 110 (1st Cir. 1988), that is not the case here. Plaintiff filed the 1997 Charge on September 11, 1997. He was terminated on June 21, 1999. Courts have held that plaintiffs have failed to demonstrate a causal connection when there is a substantial gap between the protected activity and the adverse employment action. See Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 262 (1st Cir. 1999)(affirming lower court decision that plaintiff had failed to make out prima facie case of retaliatory discharge due in

part to lack of evidence of temporal proximity between plaintiff's complaints and dismissal); Mesnick v. Gen. Elec. Co., 950 F.2d 816, 828 (1st Cir. 1991)(noting that sequence of events—nine month gap between plaintiff's filing of complaint with EEOC and firing—suggested absence of causal connection between protected conduct and adverse employment action); Oliver v. Digital Equip. Corp., 846 F.2d 103, 110-11 (1st Cir. 1988) (noting no suggestion of causal connection in case where plaintiff filed complaint with EEOC in March of 1981 and was discharged in December 1983); York v. Mobil Oil Corp., 1991 WL 53337, at *3 (observing, in case where plaintiff's protected activity occurred in late 1986 or early 1987 and his termination took place in 1989, that "[t]he time between the two negates what could have been plaintiff's attempt to prove retaliation indirectly"). Similarly, the court here concludes that the almost two year gap between the filing of the 1997 Charge and Plaintiff's termination negates any inference of a causal connection between the two events.

Finally, as noted previously, Stanley argues that it terminated four other, white employees for the same or similar infractions as Plaintiff. See Stanley's SMF ¶¶ 18-20; Stanley's Mem. at 6. Such evidence has been considered in determining a lack of causal connection between a plaintiff's protected activity and the adverse employment action. See Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 262 (1st Cir. 1999) (affirming lower court decision that was based, in part, on absence of proof that defendant employer treated similarly situated employees differently); York v. Mobil Oil Corp., No. 89-CV-1405, 1991 WL 53337, at *3 (N.D.N.Y. Jan. 18, 1991)(noting that causal connection can be shown indirectly through evidence such as disparate treatment of fellow

employees who engaged in similar behavior as plaintiff).

Accordingly, the court concludes that Plaintiff has failed to demonstrate a causal connection between his protected activity, the filing of the 1997 Charge, and the adverse employment action, his termination. Thus Plaintiff has failed to make out a prima facie case of retaliation,[17] and the court recommends that summary judgment be granted as to Plaintiff's retaliation claim.

**III. Summary**

In order to avoid summary judgment, a plaintiff "must produce evidence to permit a reasonable jury to conclude both that disparate treatment occurred and that the difference in treatment was because of race." Thomas v. Eastman Kodak Co., 183 F.3d 38, 62 (1st Cir. 1999); see also Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990)("[The plaintiff] must elucidate specific facts which would enable a jury to find that the reason given was not only a sham, but a sham intended to cover up the employer's real motive ... discrimination."). Plaintiff in the instant case has provided no affirmative evidence from which a reasonable jury could find that Defendant's stated reasons for terminating Plaintiff were pretextual and that racial discrimination or retaliation was the true reason. Rather, he has merely rested on conclusory allegations. See Ruiz v. Posadas de San Juan

[17] Since the court concludes that Plaintiff has failed to make out his prima facie case, the court need not consider Stanley's stated reason for Plaintiff's termination and whether Plaintiff has demonstrated pretext. However, the court notes that even if Plaintiff had put forth a prima facie case of retaliation, the court has already determined that Stanley has stated a legitimate, nondiscriminatory reason for terminating Plaintiff and that Plaintiff has not shown the stated reason to be pretextual.

Assocs., 124 F.3d 243, 249 n.9 (1st Cir. 1997). Thus, the court concludes that summary judgment in Defendant's favor is appropriate here.

**Conclusion**

For the foregoing reasons, I recommend that Defendant's Motion for Summary Judgment be granted. Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. See Fed. R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

David L. Martin
United States Magistrate Judge
November 13, 2002